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7 **UNITED STATES BANKRUPTCY COURT**
 8 **DISTRICT OF NEVADA**

In re: EDWIN TAKEUCHI, Debtor.	Case No. 09-18781-MKN Chapter 13 Hearing Date: September 17, 2009 Hearing Time: 3:30 P.M.
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13 **MOTION TO VALUE COLLATERAL, "STRIP OFF" AND MODIFY RIGHTS OF**
WILSHIRE CREDIT CORPORATION PURSUANT TO 11 U.S.C. § 506 (a) AND §1322

15 TO: THE HONORABLE BANKRUPTCY JUDGE MIKE K. NAKAGAWA

16 EDWIN TAKEUCHI (hereinafter referred to as "Debtor"), by and through his attorneys
 17 COLEMAN LAW ASSOCIATES, A PROFESSIONAL LAW CORPORATION, move this Court
 18 pursuant to 11 U.S.C. §506(a) AND §1322, and Bankruptcy Rules 3012 and 9014 and state:

20 **JURISDICTION**

21 The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157.

23 **STATEMENT OF FACTS**

24 1. Debtor filed a Voluntary Petition under Chapter 13, Title 11, of the United States

1 Code, Case Number 09-18781 on May 27, 2009.

2 2. On the petition date, Debtor owned real property located at 6020 Star Point
3 Court, North Las Vegas, Nevada, 89081(hereinafter referred to as "Subject Property").

4 3. The estimated value of the Subject Property was \$150,000.00 at the time the
5 instant petition was filed.

6 4. The current value of the Subject Property is \$155,000.00 (see Residential
7 Appraisal Report of the Subject Property, attached hereto as Exhibit "A").

8 5. At the time of filing the instant petition, the Subject Property was subject to the
9 following liens:

10 A. HOME EQ SERVICING, Account No. **xxxxxx8374**, (First
11 Mortgage and/or First Deed of Trust): TWO HUNDRED
EIGHTY NINE THOUSAND FIVE HUNDRED DOLLARS
12 AND ZERO CENTS (\$ 289,500.00).

13 B. WILSHIRE CREDIT CORPORATION, Account No.
14 **xxxxxx6008**,(Second Mortgage and/or Second Deed of Trust):
15 SEVENTY SIX THOUSAND EIGHT HUNDRED SEVENTY
THREE DOLLARS AND NINETY SEVEN CENTS.
(\$76,873.97).

16 6. Therefore, on the date the instant bankruptcy was filed, no equity existed in the
17 Subject Property above the claims of HOME EQ SERVICING (First Mortgage and/or Deed of
18 Trust): TWO HUNDRED EIGHTY NINE THOUSAND FIVE HUNDRED DOLLARS AND
19 ZERO CENTS (\$ 289,500.00), (ACCOUNT ENDING IN **8374**).

20 7. WILSHIRE CREDIT CORPORATION'S (Second Mortgage and/or Second Deed
21 of Trust) claim was wholly unsecured on the date of the instant petition and if the Subject Property
22 was sold at auction, WILSHIRE CREDIT CORPORATION (Second Mortgage and/or Deed of
23 Trust) would receive nothing.

24 8. Accordingly, the Debtor requests that the Court find that WILSHIRE CREDIT

1 CORPORATION'S (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of
 2 Trust) claim is unsecured and should be reclassified as a general unsecured claim, subject to
 3 allowance if disputed, to receive payments pro rata with other general unsecured creditors through
 4 the Debtor's Chapter 13 Plan.

5 **LEGAL ARGUMENT**

6 9. 11 U.S.C. §506(a) provides that a creditor's claim is only *secured* to the extent of
 7 the property value: "a lien on property ... is a secured claim to the extent of the value of such
 8 creditor's interest ... and is an unsecured claim to the extent that the value of such creditor's interest
 9 is less than the amount of such allowed claim."

10 10. In *In re Zimmer*, 313 F.3d 1220 (9th Cir.2002), the Court stated that a wholly
 11 unsecured lien holder's claim can be modified and reclassified as a general unsecured claim
 12 pursuant to 11 U.S.C. §506(a), despite the anti-modification language in §1322(b)(2) (1123(b)(5)).
 13 Specifically, the Court held:

14 Section 506(a) divides creditors' claims into "secured
 15 claims" and "unsecured claims." Although the conventional
 16 interpretation of "secured" might include any claim in which
 17 the creditor has a security interest in the Debtor's property,
 18 §506(a) makes clear that the status of a claim depends on the
 19 valuation of the property. An allowed claim of a creditor
 20 secured by a lien on property in which the estate has an interest
 21 ... is a secured claim to the extent of the value of such creditor's
 22 interest in the estate's interest in such property ... and is an
 23 unsecured claim to the extent that the value of such creditor's
 24 interest ... is less than the amount of such allowed claim.

25 To put it more simply, a claim such as a mortgage is not a
 26 "secured claim" to the extent that it exceeds the value of the
 27 property that secures it. Under the Bankruptcy Code, "secured
 28 claim" is thus a term of art; not every claim that is secured by
 a lien on a property will be considered a "secured claim". Here,
 it is plain that PSB Lending's claim for the repayment of its
 loan is an unsecured claim, because its deed of trust is junior to
 the first deed of trust, and the value of the loan secured by the
 first deed of trust is greater than the value of the house.

11. Accordingly, since WILSHIRE CREDIT CORPORATION'S (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of Trust) claim is wholly unsecured (in that there is no extant equity above the first mortgage in the Subject Property), the Court should reclassify WILSHIRE CREDIT CORPORATION'S (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of Trust) claim to a general unsecured claim to receive payments pro rata with like unsecured creditors. WILSHIRE CREDIT CORPORATION (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of Trust) should also be stripped of its secured rights under State law since no maintainable security interest in the Subject Property exists.

12. Further, the Debtor is not required to file an adversary proceeding to achieve the requested relief herein. Debtor may bring a motion to “strip off” WILSHIRE CREDIT CORPORATION’S (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of Trust) consensual lien by motion. See *In re Williams*, 166 B.R.615 (Bankr.E.D.Va.1994), *In re Fuller*, 255 B.R. 300 (Bankr.W.D.Mich.2000), *In re Hoskins*, 262 B.R. 693 (Bankr.E.D.Mich.2001), *In re King*, 290 B.R. 641 (Bankr.C.D.Ill.2003), *In re Millspaugh*, 302 B.R. 90 (Bankr.D.Idaho 2003), *Dickey v. Ben. Fin. (In re Dickey)* 293 B.R. 360 (Bankr.M.D.Pa.2003), *In re Hill*, 304 B.R. 800 (Bankr.S.D. Ohio 2003); *In re Sadala* 294 B.R. 180 (Bankr.M.D.Fla.2003), *In re Fisher*, 289 B.R. 544 (Bankr.W.D.N.Y.2003), *In re Robert*, 313 B.R. 545 (Bankr.N.D.N.Y.2004), *In re Bennett*, 312 B.R. 843 (Bankr.W.D.Ky.2004). Instead, Debtor may bring the instant motion.

WHEREFORE, Debtor prays that this Court:

1. Find that WILSHIRE CREDIT CORPORATION (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of Trust) is not a holder of a lien on the Subject Property.
2. Immediately avoid, "strip off", cancel and extinguish WILSHIRE CREDIT CORPORATION'S (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of

Trust) wholly unsecured claim/lien from the Subject Property pursuant to 11 U.S.C. Section 506(a).

2 3. Reclassify WILSHIRE CREDIT CORPORATION'S (ACCOUNT ENDING IN
3 6008; Second Mortgage and/or Second Deed of Trust) claim as a general unsecured claim, subject
4 to allowance if disputed, to be paid pro rata with other general unsecured creditors through the
5 Debtor's Chapter 13 Plan; and

6 4. Such other relief the Court finds appropriate.

8 DATED this 5th day August, 2009.

COLEMAN LAW ASSOCIATES, APLC

By: /s/: C. Andrew Wariner
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LIST OF EXHIBITS

EXHIBIT A:

RESIDENTIAL APPRAISAL REPORT

Edwin Takeuchi
Case Number 09-18781-mkn
6020 Star Point Court
North Las Vegas, NV 89081

EXHIBIT B:

PROOF OF CLAIM

U.S. Bankruptcy Court Claim # 1 - filed by Creditor, WILSHIRE CREDIT CORPORATION, (ACCOUNT ENDING IN 6008; Second Mortgage and/or Second Deed of Trust) for Seventy-six thousand eight hundred seventy three dollars and ninety-seven cents. (\$76,873.97)